Case No. 80602-1

SUPREME COURT OF THE STATE OF WASHINGTON

(Court of Appeals, Division II, No. 32714-7-II)

CHERYL DELYRIA and JUDY KOCH,

Respondents,

v.

STATE OF WASHINGTON, WASHINGTON SCHOOL FOR THE BLIND,

Petitioners.

SUPPLEMENTAL BRIEF OF RESPONDENTS CHERYL DELYRIA AND JUDY KOCH

THOMAS K. DOYLE
Attorney for Respondents

Thomas K. Doyle, WSBA No. 27897
Attorney at Law
111 S.W. Fifth Ave, Ste. 1650
Portland, OR 97204-3627
TEL (503) 227-4600
doylet@bennetthartman.com

TABLE OF CONTENTS

I. INTRODUCTION 1

II. PLAIN LANGUAGE CONTROLS 2

III. LEGISLATIVE HISTORY CANNOT CHANGE STATUTORY LANGUAGE 8

A. TRI Contracts Were First Allowed in 1987 10

B. Enactment of Alternative Methods of Compensation Does Not Indicate the Legislature Intended to Exclude State Schools Teachers From the Floor Set By the Pay Parity Statute 11

C. Allowing Supplemental Compensation in 1985 or TRI Contracts in 1987 is Irrelevant 13

IV. CONCLUSION 16

TABLE OF AUTHORITIES

Cases

Koch & Delyria v.
Washington State School for the Blind, 136 P.2d 152 (2007) 11

State v. Pub. Util. Dist. No. 1,
91 Wash.2d 378, 588 P.2d 1146 (1979) 16

State v. Roth, 78 Wash.2d 711, 479 P.2d 55 (1971) 16

State v. Smith, 117 Wn.2d 263, 814 P.2d 652 (1991) 8, 9

State v. Watson, 146 Wn.2d 947, 51 P.3d 66 (2002) 3

Western Telepage, Inc. v. City of Tacoma,
140 Wn.2d 599, 998 P.2d 884 (2000) 3, 8

Whatcom County v. City of Bellingham,
128 Wn.2d 537, 909 P.2d 1303 (1996) 3

Statutes

RCW 28A.58.095 14

RCW 41.04.510 15

RCW 41.54.010 15

RCW 72.40.028 ..... 1, 2, 4, 15

Other Authorities

www.dailygrammar.com/181to185.shtml 5

I. INTRODUCTION

The State of Washington, Washington State School for the Blind (WSSB), seeks reversal of the Washington Court of Appeals, Division II, decision in this case. The State's disagreement with the lower court's decision can be boiled down to a simple argument that RCW 72.40.028 (the "pay parity" statute) requires parity of only "base" salary between State school employees and employees of the surrounding school district. This argument was tested and rejected by the Court of Appeals. The reason it gained so little traction and should similarly be rejected by this court is that it inserts language into the statute that is not there. The phrase "base salary" does not appear in the statute. The only basis that the State has for adding this language into the statute is through inference based upon the legislative history of a completely different statute. This Court should reject the State's attempt to overturn the lower court's decision. Rather this court should return to first principals and render a decision based upon the following:

> (1) Look to the plain and unambiguous language of the statute – that statute requires parity of all salary, not certain "types" of salary;
>
> (2) Refrain from inserting language into the statute – the statute does not limit parity to certain types of salary, such as "base"

salary; and

(3) Assume that the legislature was aware of its earlier enactments – when the legislature allowed Districts to exceed the state salary schedule it could have excluded those payments from its parity obligation for the State schools, but it did not.

A straightforward application of these principals to the clear language of the statute will result in affirmation of the Division II opinion in this matter.

II. PLAIN LANGUAGE CONTROLS

The subject passage is as follows:

"[s]alaries of all certificated employees shall be set so as to conform to and be contemporary with salaries paid to other certificated employees of similar background and experience in the school district in which the program or facility is located."

RCW 72.40.028.

This statute simply requires that State schools teachers' salaries be pegged to school district teachers' salaries of similar background and experience, i.e., a teacher of ten years of experience and with a masters should earn the same salary regardless of whether they work at the WSSB or the Vancouver School District ("VSD"). It is a pay parity statute. The Court of Appeals found exactly this - that the statute requires pegging of all WSSB teachers' compensation to VSD teachers' compensation, from

whatever source derived. Thus, regardless of the source of the school district's funds, the State obligated itself to keep pace with the district's salary. That is what "pay parity" means. There are no exclusions under this provision. It does not exclude TRI payments or other payments. The statute does not limit it to specific base salary. It makes no distinctions whatsoever.

The Court of Appeals correctly held that the statutory language at issue in this case is plain and unambiguous. "To determine legislative intent, courts look first to the language of the statute." *State v. Watson*, 146 Wn.2d 947, 954, 51 P.3d 66 (2002). Courts "do not construe unambiguous statutes." *Western Telepage, Inc. v. City of Tacoma*, 140 Wn.2d 599, 608, 998 P.2d 884 (2000). "In judicial interpretation of statutes, the first rule is 'the court should assume that the legislature means exactly what it says. Plain words do not require construction'." *Id.* at 609 (citing *Whatcom County v. City of Bellingham*, 128 Wn.2d 537, 546, 909 P.2d 1303 (1996)).

The issue on review for this court, as framed by the State's petition, is whether the phrase "of similar background and experience" is ambiguous and whether it limits the type of salary that must be in parity.

According to the State, under RCW 72.40.028 (the "Pay Parity Statute") the State must pay Washington State School for the Blind ("WSSB") teachers salary equivalent to Vancouver School District ("VSD") teachers only when that salary is adjusted based upon background and experience. According to the State, "The words "background and experience" modify the word "salaries" and the two terms mean that salary based on background and experience must be comparable among School and non-School teachers in the Vancouver School District." Brief of Respondents on Appeal, p. 21.

However, despite the State's request that this Court ignore the rules of grammar, a straightforward grammatical reading of the statute is dispositive. The phrase "employees of similar background and experience" is *not* a limitation on the type of salary that requires parity, rather it is a simple prepositional phrase which modifies the noun "employees." As such, that phrase limits which employees must be in parity – WSSB employees with a certain background and experience must have pay parity with those VSD employees of similar background and experience. The phrase does not limit the type of salary that similarly situated employees receive.

The prepositional phrase "of similar background and experience" does not modify "salaries," it modifies "certificated employees." The State's argument turns, and fails, on a simple question of grammar. Once again, the full sentence is as follows:

> "*Salaries of all certificated employees shall be set so as to conform to and be contemporary with salaries paid to other certificated employees of similar background and experience in the school district in which the program or facility is located.*"

The purpose of the dependent adjectival prepositional phrase "of similar background and experience" is to modify the term immediately preceding it: "employees." Thus, certified employees of the two schools (WSSB and VSD) of similar background and experience should have conforming salaries.

Clearly, the phrase "of similar background and experience" does not modify salaries. First, under basic rules of grammar an adjectival prepositional phrase will follow right after the noun or pronoun that it modifies. *See e.g.* www.dailygrammar.com/181to185.shtml. Second, "salaries" do not have background or experience, "employees" do. The State asks this Court to read into the statute the phrase "salaries based upon background or experience." Respondent's Brief, p. 21. But that

language is not found in the statute.[1] Thus, the State's proposed interpretation of this sentence is nonsensical and contrary to basic notions of elementary grammar.

According to the State and the trial court, salary which is not based upon experience, but is rather paid equally to all employees, does not have to be matched at the State school.[2] The State's interpretation leads to nonsensical results and undercuts the protections of the pay parity statute. Thus, under the State's interpretation, if the State salary schedule were to be retooled to allow VSD to pay a flat salary to all of its employees, without consideration of background or experience, the State schools would have no obligation to match that salary. This is because that salary would no longer be based on background or experience. This reading of the statute is inconsistent with the language of the statute and is unreasonable. Such a reading defeats entirely the uncontested purpose of

---

[1] A useful exercise for the court may be to substitute the subject matter and to simplify this sentence. For instance, a parallel sentence might read: "meals for all dogs shall be the same as meals for all cats of similar age and weight." Clearly, no one would argue that only meals determined by age and weight should be equal, while meals not based on age and weight would be unrestricted. Thus, the State's argument fails as a matter of simple logic.

the statute, to ensure pay parity between the State schools and the school districts in which they are physically located.

The State has also suggested that to read the phrase "of similar background and experience" as modifying "certificated employees" would render that language superfluous. This is not true. Without that limitation, there would be no clear way of establishing which employees' salaries must be in parity. Under Respondents' plain language reading of this statute, this phrase explains what attributes of certificated employees can be taken into account in differentiating between employees within the school. [3] In other words, that language prevents a first year teacher at WSSB from claiming that this statute entitled him to the pay of a twenty-year veteran at VSD. It is apparent that the Delyria and Koch's interpretation does not render this phrase superfluous.

---

[3] The import of this phrase can be seen by simply removing it from the sentence: "Salaries of all certificated employees shall be set so as to conform to and be contemporary with salaries paid to other certificated employees . . . in the school district in which the program or facility is located." Without the prepositional phrase "of similar background and experience" there would be significant ambiguity as to wether the VSD differentiation of teachers based upon experience and background would apply to WSSB teachers.

III. LEGISLATIVE HISTORY CANNOT CHANGE STATUTORY LANGUAGE

The State relies in Petition for Review almost exclusively on the 1985 legislative history of the predecessor to the TRI statute. The State's primary argument on review relates to the timing of the legislature's approval of supplemental compensation for School District employees. According to the State, the enactment of SSB 3797 (Laws of 1985, ch. 378) (providing premium pay and compensatory time for WSSB and WSD teachers), at the same time as ESSB 3235 (Laws of 1985 Ch. 349) (providing for supplemental compensation for District teachers who work into the summer), is evidence that TRI contracts, established in 1987, were excluded from being matched under the pay parity statute.

Notably, it does not in any way cite the legislative history of the pay parity statute itself. Moreover, the legislative history on this subject does not support the State's argument.

First, legislative history cannot vary the clear and unambiguous language of a statute. "Words are given the meaning provided by the statute or, in the absence of specific definition, their ordinary meaning." *Western Telepage, Inc.*, 140 Wn.2d 599 at 609 (quoting *State v. Smith*, 117 Wn.2d 263, 271, 814 P.2d 652 (1991)). "Thus, when construing an

unambiguous statute we look to the wording of the statute, not to outside sources such as legislative intent." *Id.* at 609.

Nevertheless, what legislative history there is does not speak to the issue before the court. It is true that in 1985 the legislature provided two new methods of providing compensation - one for District teachers and another for State school teachers. For District teachers, the legislature allowed Districts to exceed the State salary cap for work beyond the regular school year. For State school teachers, the legislature allowed payment of compensatory time or premium pay. Clearly, the legislature was providing methods of payment for these teachers over and above the general salary caps. However, there is no evidence whatsoever that somehow these new methods of payment eliminated the obligation of pay parity.

Simply because the statute in 1985 was amended to pay additional salary and comp time does not eliminate the fundamental pay parity obligation. It may indicate that comp time would be an adequate method of "payment" but that is an entirely different inquiry – and one that the State has not raised.[4]

---

[4] It should be noted that this matter was resolved on summary judgment. There has been no finding that the State school

In any case, the legislature enacted these supplemental compensation provisions several years after the 1981 pay parity statute and did not change the pay parity statute in either 1985 or 1987. Enacting a differing compensation method in 1985 for State school teachers (premium pay, compensatory time) does not show a legislative intent to exclude school employees from equivalent salary to VSD teachers. Rather, this short-lived method of compensating State school teachers is not evidence of an intent to exclude those teachers from the pay parity statute's requirements. In fact, the Legislature reenacted the pay parity statute at that same time and did not exclude District supplemental contracts from the "salary" definition. Therefore, for these reasons, this court should deny this motion for reconsideration.

A. TRI Contracts Were First Allowed in 1987

TRI contracts were first created by the legislature in 1987. This was the first enactment allowing supplemental pay for District teachers who worked additional hours within the school year or had additional

---

teachers were underpaid or by how much. All that the Court of Appeals has decided at this point is that the pay parity statute requires just that – pay parity between State school teachers and resident District teachers based on background and experience. The State appears to concede in its petition that it has not complied with that requirement. However, the Court has not determined that.

responsibilities. Thus, the State's reliance on a 1985 enactment is misplaced. Moreover, a careful review of the 1985 enactment shows that this predecessor was wholly unlike the TRI statute of 1987. For instance, the 1985 Act only allowed for supplemental contracts for extra days **beyond District teachers' respective work years** or for extra duties, such as coaching or team leader positions. Whereas the 1987 TRI statute was much broader and allowed for supplemental contracts for District teachers when they worked for additional time within a work day, week, or year or had greater responsibilities.

B. Enactment of Alternative Methods of Compensation Does Not Indicate the Legislature Intended to Exclude State Schools Teachers From the Floor Set By the Pay Parity Statute

The Court of Appeals correctly rejected the State's argument that by enacting "special provisions to deal with additional work if any, to be performed by [School] teacher" in 1985, the legislature meant to exclude WSB teachers from TRI salary. The court held that this argument fails "because it does not offer any evidence that these different measures were enacted to replace TRI payments." *Koch & Delyria v. Washington State School for the Blind*, 136 P.2d 152, 156 (2007), see also at fn.10. The State provides no more evidence in its petition for review than it did in its

original brief. Therefore, the Court's opinion remains absolutely correct.

The legislature allowed for supplemental contracts in school districts, with full awareness that pay parity was required by the pay parity statute. If the legislature had meant for this 1985 provision to be in *lieu* of the pay parity requirements, it would have done so. Rather, these premium and compensatory time provisions were over and above the floor set by the pay parity provision. **In fact, SB 3797 reenacted the pay parity provision. Appellee's Motion for Reconsideration, App. B, p. 1553.** Thus, far from indicating that the premium pay/compensatory time provision were an exception to the pay parity requirement, this legislative history indicates that parity to District pay was a floor. To the extent overtime pay raised salaries above those of the District, the pay parity statute would be satisfied. To the extent State School teachers' pay was in conformity with Vancouver teachers, and they received premium pay for hours worked over eight in a day and forty in a week, both statutes would be satisfied. The pay parity provision continued to function as a floor to maintain the competitiveness of the State schools. Once again, as the Court of Appeals stated in its opinion: "That the legislature merely enacted a different compensation method for school employees does not

sufficiently show legislative intent to exclude school employees from receiving TRI payments." *Id.*

C. Allowing Supplemental Compensation in 1985 or TRI Contracts in 1987 is Irrelevant

Regardless of whether we look at the allowance for supplemental compensation in 1985 for District teachers, or TRI contracts in 1987, in either case, the legislature enacted the supplemental contract provision several years after the 1981 pay parity statute. If the legislature intended to exclude TRI payments from the pay parity statute, it could have in either 1985, when it first allowed supplemental compensation and reaffirmed the pay parity statute, or in 1987 when it created TRI contracts. In addressing the State's arguments, the court held that the legislature is presumed to have considered its prior enactments when enacting new legislation and that at the time it allowed supplemental salary (in 1985 and again in 1987), the pay parity statute was already in place from 1981. This is a core holding of this court. If the legislature had wanted to exclude supplemental compensation, TRI or otherwise, from the definition of salary it could have in 1985 or 1987. Instead, the legislature did the opposite and **reenacted** the pay parity statute in whole in the same bill that allowed for premium pay or "comp time" in 1985. Not only was the legislature presumed to be

aware of the pay parity statute, it reenacted it as part of this same bill in 1985.

Moreover, the legislature's skill and knowledge in excluding these forerunner's of TRI payments is reflected in the 1985 statute. There, the legislature specifically excluded supplemental contract payments from the definition of "salary" in the salary lid statute: "Such supplemental compensation shall not be deemed an increase in salary or compensation for purposes of RCW 28A.58.095".[5] As the State pointed out, this bill was before the same committees at the same time as the restatement and recodification of the pay parity statute in 1985. The legislature was looking at both bills at the same time, and purposefully limited supplemental contracts from the definition of salary for purposes of the salary lid statute. If it had so desired, it could have simply removed these contracts from the definition of salary in the pay parity statute. It did not, and thus the court rightly inferred that no "exception" was intended.

---

[5]Chapter 76, Laws of 1983, lst Ex. Sess. RCW 28A.58.095 read, in pertinent part, as follows: "(1) Every school district board of directors shall fix, alter, allow, and order paid salaries and compensation for all district employees. No school district board of directors may grant salary and compensation increases from any fund source whatsoever in excess of the amount and or percentage as may be provided for employees as set forth in the state operating appropriations act in effect at the time the compensation is payable."

It is also clear that where the legislature wants to define salary as only certain types of salaries, it does so explicitly. Other Washington statutes make clear that the legislature will explicitly modify the term "salary" if the legislature does not intend to mean the full amount an individual is paid. For example, RCW 41.04.510 states that:

> "'Base monthly salary' for the purposes of this section means the amount earned by the employee before any voluntary or involuntary payroll deductions, and not including overtime pay." *See* also RCW 41.54.010, which provides that: "'Base salary' . . . includes wages and salaries deferred under provisions of the United States internal revenue code, but shall exclude overtime payments, non-money maintenance compensation, and lump sum payments for deferred annual sick leave, unused accumulated vacation, unused accumulated annual leave, any form of severance pay, any bonus for voluntary retirement, any other form of leave, or any similar lump sum payment."

If, as WSSB urged and the trial court held, the legislature intended "salary" in RCW 72.40.028 to refer to something less than its plain language definition, the legislature would have stated this specifically by modifying the term "salary." It did not and therefore, this Court shall apply the plain meaning of this statutory term.

Finally, the State fails to emphasize the fact that the legislature repealed the overtime and comp time provision eight years later, yet

continued the pay parity statute unabated. Thus, once again, the legislature must be presumed to have intended to continue to require pay parity, even after eliminating the premium pay/comp time statute.

IV. CONCLUSION

The Court of Appeals' analysis is very simple:

(1) Courts presume legislatures considered prior enactments when enacting a statute. *State v. Roth*, 78 Wash.2d 711, 715, 479 P.2d 55 (1971); *State v. Pub. Util. Dist. No. 1*, 91 Wash.2d 378, 383, 588 P.2d 1146 (1979).

(2) Here, the pay parity statute has been in effect since 1980;

(3) In 1985, when the legislature allowed districts to offer supplemental pay for District teachers, the legislature could have specifically excluded those payments from "salary" under the pay parity statute, it did not;

(4) Because it did not exclude TRI payments from the pay parity statute, the pay parity statute operates to maintain pay parity between the State schools and the District teachers, regardless of how that district salary is funded.

For these reasons this Court should affirm the Court of Appeals' decision, reverse the trial court grant of summary judgment, and remand this matter for further proceedings.

Respectfully submitted this 26th day of June, 2008.

Thomas K. Doyle, WSBA No. 32407
Attorney at Law
111 SW Fifth Ave., Ste. 1650
Portland, Oregon 97204-3627
TEL 503-227-4600,
FAX 503-248-6800
Doylet@bennetthartman.com

CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing SUPPLEMENTAL BRIEF OF RESPONDENTS CHERYL DELYRIA AND JUDY KOCH

upon the following person at the following address:

W. Howard Fischer
Senior Assistant Attorney General
1125 Washington St. S.E.
P.O. Box 40100
Olympia, WA 98504-0100

Attorneys for Appellees

○ by mailing a true copy in a sealed, first-class postage-paid envelope, addressed to the attorney(s) listed above, and deposited with the United States Postal Service at Portland, Oregon, on the date set forth below.

○ by hand delivering a copy thereof to the attorney(s) listed above, on the date set forth below.

⊘ by sending via overnight courier a copy thereof in a sealed, postage-paid envelope, addressed to the attorney(s) listed above, on the date set forth below.

○ by faxing a copy thereof to the attorney(s) at the fax number(s) shown above, on the date set forth below.

DATED: June 26, 2008.

Thomas K. Doyle, OSB 97251
Of Attorneys for Appellants